SUPREME COURT, U. S.
OCT 17 1974
OFFICE

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-303.

DAVID and MARY KINEE, et al.,
Petitioners,

v.

ABRAHAM LINCOLN FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The September 27, 1973 opinion and order of the United States District Court for the Eastern District of Pennsylvania (Pet. App. A1-A16) are reported at 365 F. Supp. 975 (E. D. Pa. 1973). That court's orders of March 5, 1974 and March 29, 1974 (Pet. App. A17-A19) are unreported. The Court of Appeals for the Third Circuit's order of dismissal (Pet. App. A22-A23) and order denying rehearing (Pet. App. A24) are also unreported.

QUESTIONS PRESENTED.

1. Was the court of appeals in error in holding that the plaintiffs in a civil action have no standing to appeal from a judgment, entered as a disciplinary measure under Rule 11 of the Federal Rules of Civil Procedure, which directed their counsel to reimburse dismissed defendants for costs and counsel fees incurred by those defendants as a result of plaintiffs' counsel improperly joining them as defendants in the action?

2. Did the district court abuse its discretion under Rule 11 when, upon determining that plaintiffs' counsel had taken the names of the defendants from the Yellow Pages of the telephone directory and had named as defendants numerous parties against whom the plaintiffs did not have even a colorable claim, it disciplined counsel by directing them to reimburse the improperly named defendants for the costs and counsel fees incurred by them as a result of having been forced to appear and defend the action?

STATEMENT.

In the exercise of its discretion to regulate the conduct of attorneys appearing before it and pursuant to the authority granted by Rule 11 of the Federal Rules of Civil Procedure, the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.), entered an order directing plaintiffs' counsel to reimburse certain defendants for the costs and counsel fees incurred by them in the defense of a suit in which they had been improperly joined (Pet. App. A17-A18). Plaintiffs (but not their counsel) appealed to the Court of Appeals for the Third Circuit and that Court (Maris, Rosenn and Hunter, JJ.) dismissed the appeal on the ground that plaintiffs lacked standing to appeal (Pet. App. A22-A23).

The proceeding from which the order in question evolved had its genesis on November 16, 1972 (2a, 29a-58a),[1] when the plaintiffs (five husband and wife couples who had obtained residential mortgage financing from three mortgage companies and a savings and loan association) instituted a purported class action against 177 named defendants asserting that the primary business of each defendant was the mortgage business, that each defendant required mortgage borrowers to make monthly payments to cover estimated taxes and insurance premiums on the mortgaged properties, that each defendant utilized the "escrow" method of handling the monthly payments and derived pecuniary benefits from the use of these funds and that these benefits should be turned over to the plaintiffs and the class they sought to represent (35a, 47a-51a). The complaint alleged that the challenged "escrow" practice was unlawful in and of itself and also that the practice had come about as a result of a conspiracy among the defendants in violation of the antitrust laws (47a-55a).

1. References are to the appendix in the court of appeals.

From the outset of the litigation, it was apparent that plaintiffs' counsel had swept with much too broad a brush and had engaged in an indiscriminate naming of defendants, suing numerous parties against whom the plaintiffs and the putative class did not have even a colorable claim. Instead of investigating the practices of the defendants, counsel for the plaintiffs simply opened the Yellow Pages of the telephone directory and sued every entity listed under the headings "Banks," "Mortgages" or "Savings & Loan Associations." As a result, the complaint ended up naming as defendants some entities who were not engaged in the mortgage business at all and others who had never engaged in the practice complained of by the plaintiffs. In the months following the filing of the complaint, plaintiffs' counsel stipulated to the dismissal with prejudice of 46 entities who had thus been improvidently named as defendants in the lawsuit (82a, 108a, 137a, 138a, 153a).

The defendants, contending that plaintiffs' counsel lacked "good ground" for filing the complaint with respect to the 177 named defendants and preparatory to filing a contemplated motion to strike the complaint under Rule 11 of the Federal Rules of Civil Procedure, propounded interrogatories designed to elicit the basis for the allegations in the complaint that each defendant was engaged in the challenged practice (66a-73a). Plaintiffs and their counsel objected to those interrogatories (74a). By order dated February 21, 1973, Judge Newcomer sustained the objection, stating that he would not entertain any motion from the defendants under Rule 11 but that, *sua sponte*, he would hold a hearing to ascertain whether Rule 11 had been violated and, if so, the appropriate action to be taken (170a).

The Rule 11 hearing was held on March 8, 1973 (109a-133a). At that hearing, Judge Newcomer directed plaintiffs' counsel to show him (either in open court or in

camera) the basis upon which they had named this vast array of entities as defendants. Plaintiffs' counsel responded with vague, generalized assertions as to the impropriety of the challenged practice, but came forward with nothing to show either that they had investigated the practices of the dismissed defendants or that they had any other basis for asserting that the dismissed defendants had ever engaged in the challenged practice. During the course of the hearing, Judge Newcomer made reference to a statement that had been made on a prior occasion that some of the defendants had been joined simply because their names appeared in the Yellow Pages of the telephone directory and he asked plaintiffs' counsel whether they challenged that statement (115a). Plaintiffs' counsel did not deny that some of the defendants had been named for just that reason (115a-116a).

As the Rule 11 hearing progressed, Judge Newcomer indicated that he would not dismiss the action because of the alleged violation of Rule 11 but that he was seriously considering assessing against counsel the costs incurred by those defendants sued without justification (128a-132a). Judge Newcomer gave leave to counsel to submit affidavits and memoranda relating to his consideration of the Rule 11 question (132a-133a).

Subsequent to the Rule 11 hearing, counsel for defendants filed affidavits and accompanying materials which clearly demonstrated that counsel for the plaintiffs had agreed to drop many, if not all, of the dismissed defendants because they were not engaged in the mortgage business at all or because they were not engaged in the challenged practice (134a-139a), and that the names of the defendants had been taken verbatim from the listings under "Banks," "Mortgages" and "Savings & Loan Associations" in the March 1972 edition of the Philadelphia Yellow Pages (140a-152a). Neither plaintiffs nor their counsel filed affidavits

or memoranda to contradict or to dispute the obvious fact that counsel had done nothing more than lift the names of the defendants from the Yellow Pages. And neither plaintiffs nor their counsel ever came forward with anything to show that they had any basis whatsoever for asserting that the dismissed defendants ever engaged in the challenged practice.

On September 27, 1973, Judge Newcomer issued a Memorandum and Order (Pet. App. A1-A16) which disposed of various Rule 12 motions and which concluded that counsel had acted in a grossly improper manner in bringing suit against a large array of defendants against whom plaintiffs did not have even a colorable claim. Judge Newcomer said (Pet. App. A13-A14):

> ". . . [T]he method by which the plaintiffs' attorneys chose to discover which lending institutions in the Eastern District practiced the escrow method, and thereby were proper subjects of suit, was, in the opinion of this Court, improper, and they are to be censured for adopting it. What they did was to take the Philadelphia phone book, and to sue every individual or lending institution listed in the Philadelphia phone book under the heading of mortgage brokers or related headings. More than one-fourth of the parties thus sued have been dismissed from the case because they do not practice the escrow method, and therefore are not even arguably proper parties. The plaintiffs' attorneys set out a dragnet. Having put a large number of parties to the inconvenience, expense and possible anxiety of being sued, they then were able conveniently to separate the wheat from the chaff without great effort. They chose to inconvenience a large number of parties rather than inconvenience themselves with proper investigation as to who the proper parties

would be. When they signed their pleading, they could not say that they in fact had reasonable basis to believe that the allegations were true as to each defendant, but merely that there was within the aggregate mass of the defendants sued, a significant number of defendants, exact identities unknown, to which the allegations applied, together with an unknown number to which the allegations did not apply. This is simply not a proper way to proceed in federal court, or in any court for that matter. It is an abuse of process to use the issuance of a complaint to discover which of a number of parties is the proper party to be sued. If the plaintiffs had attempted reasonable investigation, and if some of the lending institutions who were not proper parties had not cooperated in that investigation, then perhaps they would have been justified in undertaking the course of action which they undertook. But under the circumstances of this case, the course of action which they chose was grossly improper."

Judge Newcomer then ruled that, in protection of the rights of the parties "who have been prejudiced by the misdeeds of plaintiffs' attorneys" (Pet. App. A14), he would allow the attorneys for the defendants who were wrongfully sued and then dismissed from the case to file bills of costs for the expenses incurred by their clients in having been forced improperly to appear and defend the suit and would then assess those costs against counsel for the plaintiffs (Pet. App. A15).

On November 8 and 9, 1973 (213a-214a), Judge Newcomer sent copies of the Memorandum and Order to the attorneys for each of the dismissed defendants together with an accompanying letter advising them that they could forward to him bills of costs, including reasonable attorneys fees, for the expense incurred by their clients in the defense

of the case, that he would review each bill and that, if he found the bill to be reasonable, he would forward it to counsel for the plaintiffs for payment directly to the attorney submitting the bill so that the latter could then reimburse his client in accordance with the Memorandum. Judge Newcomer's letter requested each of the attorneys to itemize his bill and stated that, in view of a possible reluctance upon the part of the attorney to make hourly rates a matter of public record, he would permit the submission of two bills, the first being an itemized accounting for "the Court's eyes only" (which Judge Newcomer would retain in his confidential file) and the second being a gross bill to be paid by counsel for the plaintiffs.

Thereafter, numerous bills were submitted by attorneys for the dismissed defendants (170a-204a, 215a-228a), some of them being submitted on the confidential basis referred to by Judge Newcomer.[2]

After reviewing the bills, and finding them "to be reasonable and appropriate as a disciplinary measure under Rule 11" (Pet. App. A18), Judge Newcomer entered an Order on March 5, 1974, directing counsel for the plaintiffs to pay specified amounts to the various attorneys for the dismissed defendants (Pet. App. A18-A19). In his Order of March 5, 1974, Judge Newcomer stated that there was no just reason for delaying the entry of final judgment in connection with the matter and directed that a final judgment within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure be entered. Judgment was thereupon entered on the docket directing plaintiffs' counsel to pay the specified amounts (18a).

On March 29, 1974, Judge Newcomer denied a motion for reconsideration of the Order of March 5, 1974 (Pet. App. A19).

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2. The bills and affidavits submitted on a confidential basis have been filed under seal (Pet. App. A20-A21).

On April 2, 1974 (23a) "the plaintiffs, individually and on behalf of all members of a class of borrowers similarly situated" filed a notice of appeal from the orders of March 5, 1974 and March 29, 1974 (229a). On May 13, 1974, an appeal was docketed in the Court of Appeals for the Third Circuit naming the plaintiffs as appellants. Although Judge Newcomer's orders were clearly directed against counsel for the plaintiffs and not against the plaintiffs themselves, no notice of appeal was filed by counsel for the plaintiffs and no appeal was taken by them.

On June 11, 1974, appellees moved to dismiss the appeal on the ground that the plaintiff-appellants were not aggrieved by and had no appealable interest in the orders from which they appealed. On July 19, 1974, the Court of Appeals for the Third Circuit granted the motion and dismissed the appeal (Pet. App. A22-A23) and on August 12, 1974 that court denied a petition filed by plaintiffs and their counsel for rehearing or, in the alternative, for permission for counsel to intervene as parties appellant (Pet. App. A24).

ARGUMENT.

I.

The Decision of the Court of Appeals Is of No Great Significance and Is Clearly Correct.

Plaintiffs would have this Court believe that the decision of the court of appeals presents a matter of overwhelming significance. This is not so.

In dismissing plaintiffs' appeal, the court of appeals simply engaged in a straightforward application of the elementary principal that only those who have been aggrieved by an order have standing to appeal from it. This presents no issue of sufficient importance to call for review by this Court and the decision is clearly correct. The plaintiffs were not aggrieved by the district court's orders of March 5, 1974 and March 29, 1974 and had no appealable interest in them. The March 5th order was a disciplinary measure directed solely against counsel for improper behavior and a violation of Rule 11 of the Federal Rules of Civil Procedure. The order clearly was not directed at the plaintiffs, did not bind them, was not harmful to them and was not a judgment against them. It required the plaintiffs to do nothing and was in no way adverse to **their** [3] property, interests or rights. "It is settled law that even a party cannot appeal from a decision which is not adverse to him." **Milgram v. Loew's, Inc.**, 192 F. 2d 579, 586 (3rd Cir. 1951), *cert. denied*, 343 U. S. 929 (1952).

A party is not aggrieved by, and may not appeal from, an order directed to his counsel. *See, e.g.*, **United States v. Boccuto**, 274 F. 2d 860 (3rd Cir. 1959), where the court held that it had no jurisdiction over an appeal taken by a

3. Wherever boldface type is used in this brief the emphasis is ours.

defendant-taxpayer from an order requiring his counsel to turn over documents in counsel's possession relating to the preparation of the taxpayer's returns. There, as here, it was counsel who was under compulsion of the court order and it was counsel who was aggrieved and had the right of appeal. The instant case was an even stronger one than **Boccuto**, for here the order of the district court had no impact on the plaintiffs' claims or defenses, but related solely to the interests of counsel. *A fortiori*, plaintiffs had no basis for appealing from the disciplinary action taken against their counsel and therefore had no standing to appeal.

Attorneys clearly have standing to appeal in their own behalf in appropriate cases. **Angoff v. Goldfine**, 270 F. 2d 185 (1st Cir. 1959); **Preston v. United States**, 284 F. 2d 514 (9th Cir. 1960); **9 Moore's Federal Practice** ¶ 203.06. The question here was not whether the orders were appealable, but **who** could appeal them. Plaintiffs' counsel had standing but failed to appeal in their own behalf. While the plaintiffs did appeal, they were without standing to do so. The dismissal of the appeal was clearly correct.

II.

The District Court Did Not Abuse Its Discretion in Directing Counsel to Reimburse the Dismissed Defendants for the Costs Incurred by Them in Having to Appear and Defend This Suit in Which They Were Improperly Named as Defendants.

Rule 11 of the Federal Rules of Civil Procedure provides, *inter alia*, that "the signature of an attorney constitutes a certificate by him that he has read the pleading; [and] that to the best of his knowledge, information and belief, there is good ground to support it. . . . If a pleading . . . is signed with intent to defeat the purpose of this

rule, it may be stricken as sham and false. . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. . . ."

Judge Newcomer had ample basis for finding that plaintiffs' counsel signed the complaint in violation of Rule 11. The essence of the complaint was the claims that each of the 177 named defendants was engaged in the mortgage business, that each was utilizing the "escrow" practice, and that this practice had come about as a result of a conspiracy among the defendants. The fact of the matter is that many of the named defendants were not even engaged in the mortgage business at all, and others were not using the complained-of "escrow" practice.

In recognition of these undeniable facts, plaintiffs' counsel dropped 46 of the defendants from the case. Plaintiffs' assertion in their petition that "the reasons for the dismissals are not of record" (Pet. 3 n. 1) is disingenuous. Through an affidavit from one of their attorneys (135a-139a), defendants placed of record two letters **from counsel for the plaintiffs** to Judge Newcomer. The first of these letters described 27 of the about-to-be-dismissed defendants (82a) as "defendants who are either not in the mortgage servicing business or who capitalize taxes, etc." (137a). The second letter described 16 other about-to-be-dismissed defendants (108a) as "defendants who have provided me with information that they either capitalize escrow payments; are not in the mortgage servicing business despite their advertising practices; or that their business is de minimis" (138a). These letters from plaintiffs' counsel to Judge Newcomer are part of the record and they make it quite clear that the dismissed defendants were dropped because they obviously could not have been involved in the challenged conduct.

The impropriety of the naming of these defendants was further demonstrated through an affidavit that the

names of the 177 defendants had simply been lifted from the Philadelphia Yellow Pages (140a-152a). Plaintiffs' counsel made no attempt to attack this demonstration and counsel came forward with nothing but evasive responses when importuned by Judge Newcomer at the Rule 11 hearing to show what investigation had been undertaken before filing the complaint naming the 177 defendants (113a). Counsel had over six months between the Rule 11 hearing of March 8, 1973 and Judge Newcomer's Memorandum and Order of September 27, 1973 within which to do something to demonstrate some good ground for naming the dismissed defendants in the first place, but counsel did nothing. Thus, there was ample basis for Judge Newcomer's conclusion that what plaintiffs' counsel had done was "set out a dragnet" (Pet. App. A13), choosing "to inconvenience a large number of parties rather than inconvenience themselves with proper investigation as to who the proper parties would be. When they signed their pleading, they could not say that they in fact had reasonable basis to believe that the allegations were true as to each defendant, but merely that there was within the aggregate mass of the defendants sued, a significant number of defendants, exact identities unknown, to which the allegations applied, together with an unknown number to which the allegations did not apply. This is simply not a proper way to proceed in federal court, or in any court for that matter" (Pet. App. A14).

The failure of counsel to investigate essential fundamental facts, their throwing out of a dragnet, the overbreadth of their pleading, and their joinder as parties defendant of persons who had no business at all being in the case, was a clear violation of Rule 11.

"A reputable attorney cannot file sham or frivolous pleadings" and "an attorney who does resort to such tactics should be disciplined." **2A Moore's Federal Practice** ¶ 11.02

at 2103-2104. When an attorney places his signature upon a pleading, he personally certifies, in the words of Rule 11, that "to the best of his knowledge, information, and belief there is good ground to support it." The rule "is designed to lay upon counsel a definite moral and professional obligation in drawing up and presenting pleadings, motions and other papers. His signature is a certificate of good faith." **2A Moore's Federal Practice** ¶ 11.02 at 2103. The rule obliges the attorney who signs a complaint "to satisfy himself that there are good grounds for the action," **5 Wright & Miller, Federal Practice & Procedure**, § 1333 at 499, and it holds him "to strict accountability". **Reynolds Metals Co. v. Metals Disintegrating Co.**, 8 F. R. D. 349, 353 (D. N. J. 1948), *aff'd* 176 F. 2d 90 (3rd Cir. 1949).

Inherent in the rule is an obligation on counsel's part to make at least a preliminary investigation of the facts before suing and to refrain from making allegations in a complaint that are not supported by the available information. See **Freeman v. Kirby**, 27 F. R. D. 395 (S. D. N. Y. 1961); **Nichols v. Alker**, 126 F Supp. 679 (E. D. N. Y. 1954), *aff'd* 231 F. 2d 68 (2nd Cir.), *cert. denied* 352 U. S. 829 (1956); **Halpern v. Barran**, 272 A. 2d 118, 120-121 (Del. Ch. 1970).

In **Halpern v. Barran**, a case interpreting a Delaware rule of civil procedure identical to Rule 11, the court struck a complaint, saying:

> "To achieve its purpose a motion under the Rule will be granted not only when counsel knew the allegations of the pleadings were false and when they had their genesis in material unknown to him; it will also be granted when there is a substantial overbreadth of pleading compared with the knowledge on which it is based. Every inference should, of course, favor the pleader. But when there is no reasonable relationship

between the charges made and the information on which they are based, then the pleading lacks good ground to support it, it is sham and will be dismissed under the Rule." 272 A. 2d at 120-121.

That is exactly the situation here. If any investigation were undertaken by plaintiffs' counsel prior to the filing of the complaint, it is perfectly clear that the investigation did not furnish counsel with any knowledge or information that would have given good ground to believe that the dismissed defendants were engaged in the complained-of practice. There was a substantial overbreadth in the naming of defendants and counsel clearly violated Rule 11 in bringing suit against a vast array of defendants whose only "sin" was having their names listed in the Yellow Pages under the headings "Banks," "Mortgages" or "Savings & Loan Associations."

Having found a violation of Rule 11, Judge Newcomer certainly had authority to discipline plaintiffs' counsel for affixing their signatures to pleadings naming, without good ground, parties defendant who were totally innocent of the complained-of practice. First it is manifest that a district court is "authorized to supervise the conduct of the members of its bar." **Richardson v. Hamilton International Corp.**, 469 F. 2d 1382, 1385 (3rd Cir. 1972), *cert. denied*, 411 U. S. 986 (1973). See also **Flaska v. Little River Marine Construction Co.**, 389 F. 2d 885, 887-888 (5th Cir. 1968), *cert. denied*, 392 U. S. 928 (1968); **E. F. Hutton & Co. v. Brown**, 305 F. Supp. 371 (S. D. Tex. 1969). This inherent supervisory authority, standing alone, was sufficient to vest in Judge Newcomer the power to fashion an appropriate sanction.

Second, Rule 11 specifically authorizes the district court judges to subject attorneys violating the rule to "appro-

priate disciplinary action." See also the authorities cited at p. 13, *supra*.

Third, Section 1927 of the Judicial Code, 28 U. S. C. § 1927, provides:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

The Advisory Committee on the Federal Rules of Civil Procedure has indicated that Section 1927 was "unaffected" by the promulgation of Rule 11, clearly implying that Section 1927 and Rule 11 work together to control the conduct of attorneys practicing in the federal courts. (See Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules). This view has remained unchanged since the original Committee Note of 1937. See **2A Moore's Federal Practice** ¶ 11.01.

Having found a violation of Rule 11 and having the power to fashion an appropriate sanction, Judge Newcomer was clearly acting within the scope of his permissible discretion when he directed plaintiffs' counsel to reimburse the dismissed defendants for the costs and counsel fees incurred by them. This not only served to discipline counsel for their misconduct but also had the salutary effect of compensating those aggrieved for the monetary damages which they sustained as a result of counsel's misdeeds. What could be a more "appropriate disciplinary action"?

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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